
(2009) 05 DEL CK 0261

In the Delhi High Court

Case No : WPC No. 16581 of 2004 and 21198 of 2007

Delhi Transport Corporation

APPELLANT

Vs

Rajinder Parkash and Another

RESPONDENT

Date of Decision : 19-05-2009

Acts Referred:

Constitution of India, 1950 — Article 226

Industrial Disputes Act, 1947 — Section 10, 11A, 33, 33(2)(b)

Citation : (2009) 3 ILR Delhi 146 Supp

Hon'ble Judges : Kailash Gambhir, J

Bench : Single Bench

Advocate : Vinay Sabharwal, for the Appellant; Rekha Palli, for the Respondent

Final Decision : Allowed

Judgement

Kailash Gambhir, J.—This order shall dispose of petitions bearing WPC 16581/2004 and WPC No. 1198/2007. By way of petition filed under Art. 226 of the Constitution of India, the petitioner in WP (C) No. 16581/2004 seeks quashing of the order dated 3.8.2001 whereby the application of the petitioner moved u/s 33(2)(b) of the Industrial Disputes Act was dismissed and in W.P. (C) No. 1198/2007 the petitioner therein seeks to challenge the final Award dated 6.9.2006 whereby the order of the termination was held illegal and unjustified.

2. The brief conspectus of the facts as set out in the petition is as under:

The Workman Rajinder Prakash was working as a Conductor and was deployed at Dushhera Maidan, Faridabad on advance booking duty on 27.12.88. It was alleged that the checking team checked the passengers and find that the workman had taken Rs. 11/- from a lady passenger and had issued her two tickets worth Rs. 9/- only. On checking the cash, it was found that the workman was having Rs. 17.50 in excess. The workman was challaned. He refused to sign on the challan. It was alleged that an enquiry was conducted and the workman was found guilty of the charges. The Depot Manager by virtue of powers

delegated to him after considering the report of the enquiry officer, issued a show cause notice dated 10.11.1989 to the workman to show cause as to why he should not be removed from the services. He submitted his reply dated 12.12.89. After considering the reply, it was not found to be satisfactory and therefore, the punishing authority passed an order to remove the workman from services vide order dated 16.03.1990. The workman challenged his removal from the service taking a plea that he had not committed any misconduct, and the allegations leveled against him were false. The workman further contended that no legal and valid enquiry was held and his removal from the service was bad.

It was also alleged in the statement of claim that the management had filed an approval application vide OP No. 10/90 before the Industrial Tribunal II, and the enquiry conducted by the Management was held to be vitiated. The workman was gainfully employed since the date of his termination and he as well as his family was suffering due to this wrong and illegal order of the Corporation. The Management contested the claim of the workman and alleged that a legal and valid enquiry was held by the management relating to the misconduct of the workman and he was found guilty of the same. The disciplinary authority passed the order of removal from service after considering the reply to the show cause notice submitted by the workman. The approval application filed by the management was dismissed by the Industrial Tribunal II by holding that the enquiry was vitiated.

3. Mr. Vinay Sabharwal & J'S. Bhasin counsel for the petitioner DTC in WPC No. 16581/2004 and WPC No. 1198/2007, respectively, contended that the petitioner DTC had made an application for approval under S. 33 (2)(b) and during the pendency of the approval application, the workman had also raised an independent industrial dispute challenging termination of his services and in the said case the tribunal passed the award against the management only on the ground that approval had been declined to the management under S. 33(2)(b) but without giving any independent finding on the misconduct of the workman was given. The contention of the counsel was that it is well settled that an industrial dispute cannot be decided by the tribunal without giving independent findings on the merit of the case merely on the ground that the approval has been declined. The counsel relied on Delhi Transport Corporation Vs. Ram Kumar and another, and DTC vs. Rajbir Singh in WPC No. 18018/2005 decided by this Court on 23/9/2008, in this regard. The counsel urged that the tribunal erred in not appreciating that the domestic enquiry was conducted and during the enquiry the Enquiry Officer had sent three request letters to the concerned passenger for appearing as witness in the enquiry but the passenger failed to appear before the enquiry officer and also that the E.O. does not enjoy the power of summons and without appreciating this decided to hold that the enquiry was vitiated and misconduct of the respondent was not proved since the passenger was not examined as a witness. The counsel contended that a passenger is not a necessary witness both in enquiry and before the tribunal and relied on decisions in Ishwar Singh vs. DTC in LPA No. 2269/2006 decided on 19/1/2007; Delhi

Transport Corporation Vs. N.L. Kakkar Presiding Officer, Industrial Tribunal No. 1 and Karan Singh, Conductor, and State of Haryana and Another Vs. Rattan Singh, , in this regard. The counsel submitted that the jurisdiction of the tribunal under S. 33 (2) (b) of the ID Act is limited and confined only to examine prima facie case. If prima facie misconduct of the employee is made out then approval has to be granted. The counsel urged that in the instant case the checking staff had been duly examined as witness, both during the enquiry, as well as before the Industrial tribunal, who supported the charges and thus, there was sufficient evidence to grant approval. In this regard he relied on Delhi Transport Corporation Vs. Ram Kumar and another, and Martin Burn Ltd. Vs. R.N. Banerjee, . The counsel averred that this court cannot re-appreciate evidence and come to its own conclusion. Counsel further submitted that the settled legal principles were not followed by the tribunal and the tribunal passed the award against the management only on the ground that the passenger was not examined as a witness. The counsel also urged that the workman's past record is also blemished as he was habitual in over charging the passengers and pocketing money thereby cheating the petitioner Corporation.

4. Per contra, Ms. Rekha Palli, counsel for the respondent contended that the petitions are barred by delay and laches and same should be dismissed forthwith. The counsel also urged that the Learned Tribunal having arrived at factual findings based on appreciation of facts duly proved by leading evidence and based on that the Court came to the conclusion that there was no misconduct on the part of the respondent and there being nothing to show that the findings of the tribunal are perverse, it would be in the interest of justice that no interference is made in the award. The counsel relied on Delhi Transport Corporation Vs. Smt. Maya, Ms. Poonam, Master Deepak, All legal heirs of respondent late Sh. Rajender Singh and The GNCT, ; MCD vs. Satyakar Singh & Anr. - in CW No. 6685/2001 decided on 30/9/2002 and Amrit Vanaspati Co. Ltd. Vs. Khem Chand and Another, in this regard. The counsel maintained that the judgments relied upon by the counsel for the petitioner are not applicable in the facts of the case as it was found by the Ld. Tribunal that neither the lady passenger Was produced or confronted by the checking staff, nor the checking staff obtained signatures of an independent person on the complaint of the passenger. The counsel submitted that the past record of the respondent has been good except for one stoppage of increment with cumulative effect of an alleged incident dated 12.1.1986, which the respondent could not challenge due to paucity of resources. The counsel also relied on the decision of the Apex Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others, , to contend that when approval is not granted for removal of a workman by the industrial tribunal then it is deemed that the order of dismissal or discharge was never passed and the workman is deemed to have continued in service and thus the order on approval application does not suffer from any infirmity. The counsel also relied on decision of this court in Delhi Transport Corporation Vs. Surinder Pal, to contend that findings on application u/s. 33 (2)

(b) given by the tribunal cannot be reversed by the tribunal in subsequent proceedings under S. 11A of the ID Act as the same would amount to sitting in appeal against earlier findings and would amount to judicial impropriety.

5. I have heard learned counsel for the parties and perused the record.

6. Matter was admitted and Rule was issued in the instant case vide order dated 24/8/2006 in writ petition bearing WPC No. 16581/2004, therefore, the issue of delay and laches does not deserve indulgence at this stage.

7. Before dealing with the issues raised in the present petitions, it would be relevant to discuss the legal position. It is now a well-settled principle of law that the principles of the Evidence Act have no strict application in a domestic enquiry and the standard of proof both in civil cases and in departmental enquiries is the same being preponderance of probabilities. In this regard the Hon"ble Apex court has observed as under in *Cholan Roadways Limited Vs. G. Thirugnanasambandam*, :

16. In *Maharashtra State Board of Secondary and Higher Secondary Education v. K.S. Gandhi* it was held: (SCC p. 748, para 37)

37. It is thus well-settled law that strict rules of the Evidence Act, and the standard of proof envisaged therein do not apply to departmental proceedings or domestic tribunal. It is open to the authorities to receive and place on record all the necessary, relevant, cogent and acceptable material facts though not proved strictly in conformity with the Evidence Act. The material must be germane and relevant to the facts in issue. In grave cases like forgery, fraud, conspiracy, misappropriation etc. seldom direct evidence would be available. Only the circumstantial evidence would furnish the proof. In our considered view inference from the evidence and circumstances must be carefully distinguished from conjectures or speculation. The mind is prone to take pleasure to adapt circumstances to one another and even in straining them a little to force them to form parts of one connected whole. There must be evidence direct or circumstantial to deduce necessary inferences in proof of the facts in issue. There can be no inferences unless there are objective facts, direct or circumstantial from which to infer the other fact which it is sought to establish..... The standard of proof is not proof beyond reasonable doubt "but" the preponderance of probabilities tending to draw an inference that the fact must be more probable. Standard of proof cannot be put in a straitjacket formula. No mathematical formula could be laid on degree of proof. The probative value could be gauged from facts and circumstances in a given case. The standard of proof is the same both in civil cases and domestic enquiries.

8. Also, it is neither in doubt nor in dispute that the jurisdiction of the Industrial Tribunal u/s 33(2)(b) of the Industrial Disputes Act is a limited one. The jurisdiction of the Industrial Tribunal u/s 33(2)(b) cannot be equated with that of Section 10 of the Industrial Disputes Act. The scope of adjudication in a proceeding u/s 33(2)(b) of the Industrial Disputes Act is limited and while

granting approval it does not sit as a court of appeal re-appreciating the evidence for itself but has to examine the findings of the enquiry officer on the evidence adduced in the domestic enquiry to ascertain whether a prima facie case had been made out on the charges levelled or the findings are perverse. In this regard the Hon''ble Apex court has observed as under in Cholan Roadways Ltd. (Supra):

18. The jurisdiction of the Tribunal while considering an application for grant of approval has succinctly been stated by this Court in *Martin Burn Ltd. v. R.N. Banerjee* While exercising jurisdiction u/s 33(2)(b) of the Act, the Industrial Tribunal is required to see as to whether a prima facie case has been made out as regards the validity or otherwise of the domestic enquiry held against the delinquent, keeping in view the fact that if the permission or approval is granted, the order of discharge or dismissal which may be passed against the delinquent employee would be liable to be challenged in an appropriate proceeding before the Industrial Tribunal in terms of the provision of the Industrial Disputes Act. In *Martin Burn* case this Court stated: (AIR p. 85, para 27)

A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. While determining whether a prima facie case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence. It may be that the Tribunal considering this question may itself have arrived at a different conclusion. It has, however, not to substitute its own judgment for the judgment in question. It has only got to consider whether the view taken is a possible view on the evidence on the record. (See *Buckingham & Carnatic Co. Ltd. v. Workers of the Company.*)

9. There is no dispute to the legal position that in matters where the conductor is accused of having misappropriated the fare by not issuing ticket it is not necessary to call the passenger and the statement of the checking staff would suffice to prove the misconduct. In this connection decision of the Supreme Court in *State of Haryana and Another Vs. Rattan Singh*, is worth noting, which is as under:

It is well settled that in a domestic enquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. All materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. It is true that departmental authorities and administrative tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Indian Evidence Act For this proposition it is not necessary to cite decisions nor text books, although we have been taken through case law and other authorities by counsel on both sides. The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice. Of course, fair play is the basis and if

perversity or arbitrariness, bias or surrender of independence of judgment vitiate the conclusions reached, such finding, even though of a domestic tribunal, cannot be held good. However, the courts below misdirected themselves, perhaps, in insisting that passengers who had come in and gone out should be chased and brought before the tribunal before a valid finding could be recorded. The "residuum" rule to which counsel for the respondent referred, based upon certain passages from American Jurisprudence does not go to that extent nor does the passage from Halsbury insist on such rigid requirement. The simple point is, was there some evidence or was there no evidence - not in the sense of the technical rules governing regular court proceedings but in a fair commonsense way as men of understanding and worldly wisdom will accept. Viewed in this way, sufficiency of evidence in proof of the finding by a domestic tribunal is beyond scrutiny. Absence of any evidence in support of a finding is certainly available for the court to look into because it amounts to an error of law apparent on the record. We find, in this case, that the evidence of Chamanlal, Inspector of the flying squad, is some evidence which has relevance to the charge levelled against the respondent. Therefore, we are unable to hold that the order is invalid on that ground.

10. As for the legal position regarding whether grant or refusal of permission by the Industrial Tribunal u/s 33 (2)(b) is not an adjudication and the industrial adjudication comes only when the matter is referred u/s 10 of the Labour Court. The issue is no more res integra as the same has been put at rest by Division Bench judgment of this Court in Delhi Transport Corporation Vs. Ram Kumar and another, , which has been followed by this court in DTC vs. Rajbir Singh in WPC No. 18018/2005 decided by this Court on 23/9/2008. The relevant portion of the Division Bench judgment is as under:

6. That the jurisdiction under S. 33 of the Act is only to impose a ban on the right of the employer and the only thing that the authority is called upon to do is to grant or withhold the permission, i.e., to lift or maintain the ban. See The Automobile Products of India Ltd. Vs. Rukmaji Bala and Others, . That case also emphasised the limited nature of the jurisdiction u/s 33. With regard to the scope of enquiry under S. 33 of Industrial disputes Act it is now well settled that "The Tribunal before whom an application is made under that section has not to adjudicate upon any Industrial dispute arising between the employer and the workman but has only got to consider whether the ban which is imposed on the employer in matter of altering the conditions of employment to the prejudice of the workman or his discharge or punishment whether by dismissal or otherwise during the pendency of the proceedings therein referred to should be lifted. A prima facie case has to be made out by the employer for the lifting of such ban and the only jurisdiction which the Tribunal has is either to give such permission or to refuse it provided the employer is not acting mala fide or is not resorting to any unfair practice of victimization. "See Lakshmi Devi Sugar Mills Ltd. Vs. Pt. Ram Sarup, withstanding this clear law an effort was again made before the Supreme Court to urge that a decision given while approving or refusing

permission for dismissal would amount to rest judicata in subsequent adjudication when a reference is made under S. 10. This plea was however, again negative in *Mckenzie and Co. Ltd. Vs. Its Workmen and Others*, wherein it was held that proceeding u/s 33 does not confer any jurisdiction on a Tribunal to adjudicate on a dispute but it merely empowers the Tribunal to give or withhold permission to the employer during the pendency of an industrial dispute to discharge or punish a workman concerned in the industrial dispute". The plea of rest judicata was unmistakably rejected when the Court further observed as follows :

As the purpose of S. 33 of the Act is merely to give or withhold permission and not to adjudicate upon an industrial dispute, any finding under S. 33 would not operate as rest judicata and bar the raising of an industrial dispute".

7. Thus the law is well-settled that S. 33 only imposes a ban. An order of dismissal or discharge passed even with the permission or approval of the Tribunal can form the subject of a dispute and as such referred for adjudication. See *The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others*, . The main thrust of the argument of Mr. Malhotra, however, seems to rest on the observations made in *Bengal Bhatdee Coal Co. Vs. Ram Prabesh Singh and Others*, . In that case while disposing of an appeal against the dismissal of a workman which was referred under S. 10 of the Act challenge was made that no finding had been given by the Tribunal that the enquiry was proper and this vitiated the award and that the dismissal was mere victimization. In rejecting this the Supreme Court observed that the Tribunal had apparently held that the enquiry was proper though it has not said so in so many words in its award, nor did it find that the finding of the enquiry officer were perverse or baseless". It, however, also added "that it could hardly be otherwise as it had already approved of the action taken on an application made under S. 33(2)(b) of the Act and if the enquiry had not been proper the Tribunal would not have approved of the dismissal." Mr. Malhotra says that this observation means that if an approval has been given under S. 33(2)(b) is incompetent, because that is the real effect of acceptance of this argument. But this would be against the settled law laid down by various Supreme court decisions both before and after the decision in the *Bengal Bhatddes* case that notwithstanding the approval obtained under S. 33(2)(b) for the dismissal of an employee, this dispute can form the subject of a dispute and of a reference under S. 10 for adjudication.

11. Thus, it is manifest from the aforesaid decision of the Division Bench that grant or refusal of permission by the Industrial Tribunal u/s 33(2)(b) is not an adjudication and the industrial adjudication comes only when the matter is referred u/s 10 of the Labour Court to the Tribunal. Thus, an award should be passed on merits of the case and the case of the management should not be dismissed merely on the premise that application under S. 33 (2) (b) of the ID Act was dismissed.

12. In the instant case, the tribunal has observed in para 16 of the award that

the entire case of the management revolves around d the written complaint in the hand writing of the lady passenger who was not examined before the enquiry officer as well as before the tribunal, and also since the checking staff was not an eye-witness to the said incident, therefore, the enquiry proceedings stand vitiated.

13. However, it is established from the records that the aforesaid passenger who made the complaint was sought to be produced in the inquiry proceeding and summons were issued to her. But the said passenger did not appear in the inquiry nor did she send any information. Clearly, every effort was made by the management and the inquiry officer to examine the aforesaid passenger witness but despite best efforts, the passenger witness did not appear in the inquiry proceeding to depose and establish the allegations made by her. It is, however, an admitted position that the three checking staff members were examined during the enquiry proceedings and out of them since two had expired; only one was examined before the tribunal and as discussed above, the statement of the checking staff would suffice to prove the misconduct. Also, there is no evidence on record to show that any of them had any animosity against the respondent at any stage. There is no reason as to why any of the said witnesses would depose falsely against the respondent.

14. The essence of a judicial approach lies in objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice. Undoubtedly, fairplay is the basis of a decision and if perversity or arbitrariness, bias or surrender of independence of judgment vitiates the conclusions reached, such finding even though of a domestic tribunal, cannot be held good. However, the Court below misdirected itself perhaps, in insisting that passenger who had come in and gone out should be chased and brought before the tribunal before a valid finding could be recorded.

15. In view of the aforesaid legal position, I feel that the court below erred in passing the award in writ petition bearing WPC No. 16581/2004 against the management only on the ground that the passenger had not been examined as a witness.

16. Also, as discussed above, the award which is not a judgment on merits cannot stand the test of judicial scrutiny and the impugned award in writ petition bearing WPC No. 1198/2007 is, therefore, set aside.

17. The judgments relied upon by the counsel for the respondent are not applicable in the facts of the present case in view of the foregoing discussion. In view of the aforesaid, both the petitions are allowed and the order dated 3/8/2001 in writ petition bearing WPC No. 16581/2004 and award dated 6/9/2006 in writ petition bearing WPC No. 1198/2007 are hereby quashed and W.P (C) No. 1198/2007 is remanded back to the Tribunal for fresh adjudication of reference on its merits.